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Supreme Court of the United States

October Term, 1974
No. 74-207

AKRON PRESFORM MOLD COMPANY,
Petitioner,
vs.
McNEIL CORPORATION, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT, THE B. F. GOODRICH COMPANY, IN OPPOSITION

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September 24, 1974

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS

INTRODUCTIORY STATEMENT 1

ARGUMENT 2

I. The Lower Courts Correctly Applied Rule 56(e) Federal Rules of Civil Procedure in Entering Final Judgment for the Respondents 3

II. The Authorities Relied Upon by the Petitioner Do Not Support His Position Under Rule 56(e) F.R.C.P. and Are Based Upon Quite Different Factual Situations Than Those Which Here Prevail 7

III. The Courts Below Recognized and Correctly Applied the Rules of Walker and Zenith 8

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Barr Rubber Products Co. v. Sun Rubber Co., 277 F. Supp. 484 (1967) 10

Barr Rubber Products Co. v. Sun Rubber Co., 425 F.2d 1114 (1970), cert. den., 400 U.S. 878 (1970) 10

International Longshoremen's & Warehousemen's U. v. Kuntz, 334 F.2d 165 (1964) (9th Cir.) 6

McHenry v. Ford Motor Co., 269 F.2d 18 (6th Cir. 1959) 8

Poller v. Columbia Broadcasting System, Inc., et al., 368 U.S. 464 (1962) 7

Ransburg Electro-Coating Corp. v. Landsdale Finishers, Inc., 484 F.2d 1037 (3rd Cir. 1973) 8
Walker Process Equipment Inc. v. Food Machinery & Chem. Corp., 382 U.S. 172 ..... 2, 8, 9
Zenith Radio Corp v. Hazeltine Research, Inc., 401 U.S. 321 (1971) 2, 8, 11, 12

Statutes

Federal Rules of Civil Procedure, Rule 12(b) 3
Federal Ruels of Civil Procedure, Rule 56(e) 3, 4, 5, 7, 8, 9

Texts

MOORE'S FEDERAL PRACTICE (Second Edition), Vol. 6, Summary Judgment, Section 56, pp. 2162, 2163, 2822 ..... 5, 6

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INTRODUCTORY STATEMENT

The Petition for Writ of Certiorari should be denied. Nothing is presented to require this Court to review, for a third time, the well-established legal principles which compelled the decisions below. No conflict among Courts of Appeals is presented. No undecided or improperly decided important question of Federal law is involved. No departure from accepted and usual course of judicial proceedings appears. In short, Petitioner, despite the prolixity of the verbiage employed, has failed to meet the requirements of Rule 19 for invoking the sound judicial discretion of this

Court to review the proceedings below. Rather, the Court is presented merely with the not unusual lament of a disappointed and unsuccessful litigant, or, more accurately, the lament of disappointed counsel for an unsuccessful litigant.

As appears from the record (A5-A6) litigation involving disputes between Petitioner and its counsel and Respondents, with regard to essentially the same subject matter has now persisted for approximately 20 years. Moreover, throughout the period of 20 years, Petitioner and its counsel have been unsuccessful. The resultant disappointment and lament of Petitioner and its counsel, though understandable, furnish no basis for invoking the discretionary jurisdiction of this Court. No matter how distasteful such a result may be to some advocates, all litigation must ultimately come to a conclusion.

ARGUMENT

By and large, Petitioner's presentation consists of a somewhat meandering argument to the effect that the Courts below did not properly understand the facts, many of which are asserted without record support, and that, despite their careful analysis and application thereof, neither the District Court nor the Court of Appeals really understood the decisions of this Court in *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, and *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321. A mere reading of the opinions below clearly reveals the fallacy of this argument. Both *Walker* and *Zenith* were understood by the lower courts and were correctly applied. The fact that their application was contrary to that sought by Petitioner is no ground for the granting of Certiorari.

Petitioner also suggests that the Courts below were guilty of procedural error in their failure to treat Petitioner's pleadings[1] as having an evidentiary thrust sufficient to create a factual conflict with the affidavits presented by the Respondents in support of their respective Motions for Summary Judgment and Motions to Dismiss (treated by the Courts below as Motions for Summary Judgment.)

Examination of the Federal Rules of Civil Procedure, particularly Rule 56(e) thereof, at once discloses the fallacy of Petitioner's argument.

I. The Lower Courts Correctly Applied Rule 56(e) Federal Rules of Civil Procedure in Entering Final Judgment for the Respondents.

In all three of the cases filed by Petitioner below,[2] Respondents filed Motions to Dismiss on the ground that the actions were barred by the Statute of Limitations. Since said motions were in each case supported by factual affidavits, the District Court properly treated the motions as Motions for Summary Judgment. See Rule 12(b) F.R.C.P.

Upon reviewing the affidavits, which were in no way controverted, explained or avoided by counteraffidavits, the District Court found, and the Court of Appeals agreed, that in each case, the last overt act committed in aid of the alleged conspiracy "occurred more than 4 years before the Complaint was filed." (A28, A32 and A38). That being true, the District Court held, and the Court of Appeals concurred, that all three cases, constituting claims of conspiracy

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1. It is significant that Petitioner omits to include copies of the pleadings in the Appendix.

2. All three cases were consolidated for argument in the Court of Appeals and are here covered by a single Petition Writ of Certiorari.

to violate the antitrust laws, were barred because none of them had been commenced "within 4 years after the cause of action accrued." 15 U.S.C. §15b. In so holding, the Courts merely applied the rule, long well settled, that the Statute of Limitations begins to run from the date of the last overt act of the alleged conspiracy which caused injury or damage.

Petitioner complains because, despite his complete failure and omission to rebut, explain or avoid the affidavits filed by Respondents, the courts below did not give evidentiary weight to his pleadings. In taking this position, Petitioner not only relies upon authorities which do not support his position, but also ignores completely the plain and unambiguous language of Rule 56(e) F.R.C.P.

Rule 56(e) in pertinent part provides:

> "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. * * * When a motion for summary judgment is made and supported as provided in this rule, *an adverse party may not rest upon the mere allegations or denials of his pleadings*, but his response, by affidavits or otherwise provided in this rule, *must set forth specific facts showing that there is a genuine issue for trial.* If he does not so respond, summary judgment, if appropriate, shall be entered against him." (Emphasis supplied)

That part of Rule 56(e) providing that once affidavits are filed in support of a Motion for Summary Judgment, the opposing party may not rely on his pleadings in opposition thereto, but must "set forth specific facts showing that there is a genuine issue for trial" was adopted in 1963 for the

very purpose of invalidating the argument here advanced by Petitioner. The background for the adoption of the 1963 amendment to Rule 56(e) is analyzed and explained in MOORE'S FEDERAL PRACTICE (Second Edition), Summary Judgment, Section 56.

MOORE'S treatise states at pages 2162 and 2163:

"As originally promulgated, Rule 56(e) stated that:

> 'Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.'

"Then in 1963, subdivision (e) was amended by adding the two following concluding sentences:

> 'When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of this pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.'

"The purpose of this amendment was to overcome some judicial authority, notably in the Third Circuit, to which we shall subsequently refer, that affidavits could not cut through well-pleaded allegations. This restriction upon summary judgment was repudiated by the 1963 amendment, *supra*, in favor of the *contra* and well-established, sound doctrine subsequently discussed."

In further amplification the treatise subsequently says at page 2822:

> "The 1963 amendment was declaratory of the sound rule, almost universally subscribed to outside the Third Circuit, that pleadings themselves could not stand in the way of granting an otherwise justified summary judgment. The principle of the amendment should be made fully effective. And while pleadings are to be construed liberally in favor of the pleader on a motion to dismiss or for judgment on the pleadings, when such a motion is turned into a motion for summary judgment the party opposing summary judgment must normally disclose the merits of his case or defense; and his failure to do so ends his entitlement to the rule of liberally construing the pleadings in his favor."

Further recognition of Professor Moore's analysis is found in *International Longshoremen's & Warehousemen's U. v. Kuntz*, 334 F.2d 165 (1964) (9th Cir.), where the following appears in Footnote No. 4 on page 168 of the report:

> "Where it is apparent that the court below had before it and considered matters outside the complaint, the Court of Appeals is not bound by the fact that the appeal is, in form, from a motion to dismiss. *Dinwiddie v. Brown*, 230 F.2d 465, 468 (5th Cir. 1956); *Lane Bryant, Inc. v. Maternity Lane, Ltd.*, 173 F.2d 559 (9th Cir. 1949.) Rather, it is to be treated as a motion for summary judgment as permitted by Rule 12 (b), F.R. Civ. P. In this connection, the Second Circuit, observed that '* * * [D]efendants' filing of affidavits with their motion for summary judgment, F.R. [Civ. P.] 12(b) and placed upon plaintiff an obligation to disclose the merits of their case.' Plaintiff's failure to do so ends their entitlement to liberal construction of the pleadings in their favor."

It follows that Petitioner's argument "that pleadings are to be liberally construed in favor of the party opposing the motion and the court is required to take the view most favorable to the party opposing the motion, giving that party the benefit of all favorable inferences" (Petition 13) simply ignores the 1963 amendment to Rule 56(e). The District Court (A28-29, 32, 38) and the Court of Appeals (A11-12) fully understood and correctly applied the rule as it now stands.

II. The Authorities Relied Upon by the Petitioner Do Not Support His Position under Rule 56(e) F.R.C.P. and Are Based Upon Quite Different Factual Situations Than Those Which Here Prevail.

On pages 13 and 14 of his Petition, Petitioner cites authorities allegedly supporting his claim that the Court misapplied the requirements of the Federal Rules of Civil Procedure with respect to the consideration of motions for summary judgment. These cases simply do not support Petitioner's position and are based on quite different facts from those here presented.

Poller v. Columbia Broadcasting System, Inc., et al., 368 U.S. 464, did not involve a situation where one resisting a motion for summary judgment merely relied upon the breadth of his pleadings to refute affidavits filed pursuant to Rule 56(e). Rather, in *Poller*, the majority of the court, in a five to four decision, concluded upon the basis of affidavits *and counteraffidavits, depositions and exhibits* that there was disclosed "a genuine issue for trial" Rule 56(e) F.R.C.P. As the majority opinion put it:

> "It may be that upon all of the evidence a jury would be with the respondents. But we cannot say on this record that 'it is quite clear what the truth is.'

Certainly there is no conclusive evidence supporting the respondents' theory." 368 U.S. at pp. 472, 473.

In *McHenry v. Ford Motor Co.*, 269 F.2d 18 (1959), it is apparent from a reading of the opinion that the motion for summary judgment was determined upon the pleadings and did not involve affidavits or counteraffidavits of evidentiary facts. At page 23 of the report the court said:

"*Under these pleadings* the material facts of the case were disputed." (Emphasis supplied.)

In appraising the pleadings, the Court did recognize that "the pleadings are to be liberally construed in favor of the party opposing the motion." 269 F.2d at page 22. Moreover, *McHenry* was decided prior to the 1963 amendment in Rule 56(e). Clearly, it provides no authority for the issue presented here.

Ransburg Electro-Coating Corp. v. Lansdale Finishers, Inc., 484 F.2d 1037 (1973) (3rd Cir.), is equally inapposite to the issue here presented. It stands for no more than that on summary judgment the record must conclusively disclose, i.e., without "genuine issue as to any material fact," that the motion for summary judgment should be granted. Both courts below recognized the validity of this concept and applied it to the uncontroverted facts here presented in Respondent's affidavits.

III. The Courts Below Recognized and Correctly Applied the Rules of Walker and Zenith.

Petitioner complains that the Courts below did not properly follow this Court's decisions in the cases of *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 and *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321. Plaintiff's argument fails to sup-

port his position with respect to either case and examination of the opinions below discloses the contrary.

Petitioner argues here, as he did in the Court of Appeals, that an attempt by the holder of a fraudulently procured patent to enforce the patent constitutes a per se violation of the antitrust laws (Petitioner's brief, p. 10). This position was properly rejected by the Court of Appeals (Footnote 4, A13). In the language of this Court, its holding was that: "Proof" of the "assertion" that one obtained a "patent by knowingly and willfully misrepresenting facts to the patent office" would be sufficient to strip the holder of the patent thereby obtained "of its exemption from the antitrust laws." 382 U.S. 172 at p. 177. It is apparent that this Court did not thereby create a new per se violation of the antitrust laws. Moreover, after establishing the criteria for stripping a patentee of the patent defense, it went on to say:

> "To establish monopolization or attempt to monopolize a part of trade or commerce under §2 of the Sherman Act, it would then be necessary to appraise the exclusionary power of the illegal patent claim in terms of the relevant market for the product involved. Without a definition of that market there is no way to measure [the Patentee's] ability to lessen or destroy competition."

Not only does Petitioner misread *Walker* but it also fails to bring itself factually within the reading for which it contends. Essential to any application of *Walker* would be the fact that the patents involved, enforcement of which is claimed to have violated the antitrust law, were knowingly obtained by fraud. No such fact was established or attempted by Petitioner to be established by affidavit or other evidence as required by Rule 56(e) F.R.C.P.

In the Courts below, and again here (Petition 17, 19), Petitioner relies to support its claim of Respondents' fraud in obtaining patents, exclusively on findings of the District Court for the Southern District of New York in *Barr Rubber Products Co. v. Sun Rubber Co.*, 277 F. Supp. 484. Clearly, such findings are of no evidentiary value in this case. Moreover, contrary to the contention of Petitioner that the reversal of such findings was based solely on dissatisfaction by the Court of Appeals with the burden of proof applied by the District Court (Petition 17 and 18), the Court of Appeals in *Barr Rubber Products* categorically rejected the District Court's findings of fraud as contrary to the evidence, no matter what burden of proof were applied.

In *Barr Rubber Products Co. v. Sun Rubber Co.*, 425 F.2d 1114 (2d Cir. 1970), cert. denied, 400 U.S. 878, the Court stated the issue before it as follows:

> "Upon appeal, therefore, central to a disposition of the multitude of issues inherent in this case, must necessarily be a ruling upon whether there was an intentional fabrication of evidence as the district court found there to have been." Page 1120.

True it is that, in deciding this central question the Court of Appeals held that the District Court had employed an improper rule as to burden of proof. Thereafter, however, the Court clearly concluded that, *"under any rule of proof,* there was no evidence to support the charges, saying at page 1121:

> "Furthermore, irrespective of the failure of the court below to apply the proper standard of proof, we hold that the evidence did not suffice to prove the commission of perjury even if the 'preponderance of the evidence' standard is applied as the test. * * * In holding that the invention date of April 1948 was a deliberate fiction,

> the court relied upon a multitude of scattered inferences which were unreasonably drawn from flimsy evidence."

In the face of this state of facts the District Court and the Court of Appeals were both clearly correct in their conclusion that the record below showed no fraudulent concealment on the part of Respondents which would entitle Petitioner to toll the running of the Statute of Limitations.

Similarly, Petitioner misconstrues *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), and wholly fails to establish its entitlement to the rule of that case.

At the outset, *Zenith* restates the long established rules with respect to the effect of the Statute of Limitations in antitrust actions saying at page 338:

> "The basic rule is that damages are recoverable under the federal antitrust acts only if suit therefor is 'commenced within four years after the cause of action accrued,' 15 U.S.C. §15b, plus any additional number of years during which the statute of limitations was tolled. Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. See, e.g. *Suckow Borax Mines Consolidated, Inc. v. Borax Consolidated, Ltd.*, 185 F. 2d 196, 208 (CA 9 1950); *Bluefields S.S. Co. v. United Fruit Co.*, 243 F. 1, 20 (CA 3 1917), appeal dismissed, 248 U.S. 595 (1919); *2361 State Corp. v. Sealy, Inc.*, 263 F.Supp. 845, 850 (ND Ill. 1967). This much is plain from the treble-damage statute itself. 15 U.S.C. §15. In the context of a continuing conspiracy to violate the antitrust laws, such as the conspiracy in the instant case, this has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those

damages, the statute of limitations runs from the commission of the act."

The only change in previously established rules for the operation of the Statute of Limitations made by *Zenith* was that damages resulting from the last injurious act, committed in violation of the antitrust laws, will be barred four years after they become provable, rather than four years after the occurrence of the act causing such damages. The purpose of the change was to protect an injured party whose damages might still be speculative as to proof at the expiration of four years after the occurrence of the damaging act by extending the running of the statute to commence at the time when the damages ceased to be speculative and became provable. Once the date of the last act, committed pursuant to an antitrust conspiracy, which causes injury to the plaintiff has been established, the plaintiff and the plaintiff alone, is possessed of the information upon which proof of his damages can be made. Further, the plaintiff, and the plaintiff alone, is the only person capable of demonstrating that damages, at one time speculative, have ripened into a provable state. These facts are wholly without the knowledge of the defendant.

The Courts below recognized the rule of *Zenith* and then held that *Zenith*, in this case, could not be deemed to have extended the Statute of Limitations for a period beyond four years from the date of the last damaging overt act committed by the defendants because there was no proof of evidence of any kind adduced by the plaintiff to show that damages which it might have suffered within the statutory period were then speculative in nature, but thereafter ripened into a situation where they were capable of non-speculative proof. In reaching such a conclusion, the Courts below clearly followed, rather than ignored, or misapplied, the rule of *Zenith*.

CONCLUSION

Upon the only evidence available to them, the Courts below each found as an uncontroverted fact that the last alleged act claimed to have caused injury to the plaintiff occurred more than four years prior to the commencement of any of the actions below (CA A11-14, District Court A27-29). No evidence whatever having been submitted by affidavit, deposition, exhibit or otherwise to the contrary and no evidence in avoidance thereof having been adduced with respect to the later ripening of proof of damages, theretofore speculative or of fraudulent concealment on the part of the defendants, or any of them, the decisions of the lower courts clearly were correct.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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